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SUPREME COURT, U.S.

CASE No. 463-73

IN THE SUPREME COURT OF THE UNITED STATES

State of New Jersey	:	A-2360 Term. 1974
	:	
Plaintiff Respondent.	:	Criminal Action
	:	
Vs.	:	On appeal form judgement
	:	
Willie Lee Dillard		Of conviction in law
v.		
R. J. Marks, SUPT, et al.		Division, Camden County

PETITIONER'S

On appeal from the Court of the State of New Jersey, petition for a Writ of Certiorari to the Supreme Court of the United States.

By: Willie Lee Dillard
Appellant for petition
Drawer R.
Huntingdon, Pa. 16652

S/ Willie L Dillard

IN THE SUPREME COURT OF THE UNITED STATES

Willie Lee Dillard	:	No. 463-73
	:	
Petitioner's	:	A-2360 Term. 1976
	:	
Vs.	:	
	:	
State of New Jersey		

Petition for a Writ of Certiorari to the

Supreme Court of the United States.

To the Honorable, The Chief Justice and associate Justices of the Supreme Court of the United States.

Willie Lee Dillard, the petitioners herein, pray that a Writ of Certiorari be issued to review the corrected judgement of the State of New Jersey, Camden County Court, entered in the above entitled case, on April 14,1981.

Questions Presented

(1) Whether the trial Court erred in permitting the in-Court identification of defendant.

(2) Errors complained of and comments upon the appellate divisions opinon: The appellated division failed to set forth its rationale in rejecting the defendants contentions. It is respectfully urged here that the in-Court identification of the defendant was tainted and impermissibly suggestive.

Later after Miss Dixon had been released from the hospital, she was shown " about one hundred" photographs at the Detective Bureau. After carefully viewing them,she declined to identify anyone appearing in that array..

Five days later, on January 24th. she was shown a differant array

by detective Anderson of eleven photographs conisting of black males in their 20's and 30's. The photographs were handedto her in a stack. She went through the pile one by one untill she reached Mr. Dillards photograph, which was somewhere in the middle.

Miss Dixon immediately isolated the defendants photograph and told Detective Anderson that she was " almost"definitely sure that the defendant was her assailant.

Detective Anderson told her she had to be sure, but she said that she still had a"small doubt". Detective Anderson then laid the pictures out on the desk and told Miss Dixon to look again.

Once again Miss Dixon picked out the defendants picture, rejecting all of the others. When asked again if she was sure, she admitted that she still was not absolutely positive. (T-38-11 to 40-9).

At that point after Miss Dixon had indicated that she was "almost definitely sure" that the defendant was the man who attacked her, Detective Anderson said, " I'm not suppose to do this, but the picture you Picked out, if I told you that man had the license tag No. WGK-205, he's been previously arrested for the same thing, and that he lives in North Camden, would you say that he is the man?" Miss Dixon answered, " Yes I would definitely." (T-40-10 to 16)

THE PETITION

The only question presented by this petition is whether the display and remarks, so tainted Dixon's subsequent in court idenifcation of Dillard, that it should not have been admitted into evidence.

The Appellate division of the New Jersey Superior Court,held that no such taint existed. And the New Jersey Supreme Court denied Dillard petition for certification.

States that presumption will be over come where the applicant proves that he did not recieve a full, fair and adequate hearing in the court proceeding.

Dillard argues that allowing Dixon's allegedly tainted in-court identification of him as her attacker, denied him the guarantees of Section 2254(d)6. The instant case is controlled by the United States Supreme Court's holdings in Neil Vs. Biggers, 409 U.S. 188 (1972). That case involed a rape.

CONCLUSION

For the aforegoing reasons this petition for a Writ of Certiorari, should be granted. Respectfully Submitted.

S/ Willie L Dillard

Willie Lee Dillard
Drawer R.
Huntingdon,Pa. 16652

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C. A. Misc. Rec. No. 80-8177

WILLIE L. DILLARD

vs.

R. J. MARKS, Superintendent and
THE ATTORNEY GENERAL OF STATE OF
NEW JERSEY

WILLIE LEE DILLARD,
Appellant

(D.N.J. Civ. No. 80-1282; Camden)

Present: ALDISERT and HIGGINBOTHAM, Circuit Judges

Submitted by the Clerk on appellant's behalf is a request for issuance of a certificate of probable cause pursuant to Rule 22(b), Federal Rules of Appellant Procedure

in the above matter listed for February 10, 1981 or as the Court decides.

Respectfully,

Sally Marks

Clerk

SM:PDS:lls
enc.

The foregoing Motion is/~~are~~ denied and case dismissed for lack of jurisdiction.

By the Court,

A. Leon Higginbotham, Jr.
Judge

Dated: 2-11-81

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
ex rel. WILLIE L. DILLARD,

Petitioner,

v.

B. J. MARKS, SUPERINTENDENT
PENNSYLVANI STATE PENITENTIARY
and THE ATTORNEY GENERAL OF
THE STATE OF NEW JERSEY,

Respondents.

Civil Action No. 80-1282

On Petition for Writ of
Habeas Corpus

OPINION

MITCHELL H. COHEN, SENIOR
JUDGE, UNITED STATES DISTRICT
COURT

FILED: SEPTEMBER 17th, 1980.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA ex rel. WILLIE L. DILLARD, Petitioner,	:	Civil Action No. 80-1282
v.	:	
R. J. MARKS, SUPERINTENDENT PENNSYLVANIA STATE PENITENTIARY and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, Respondents.	:	ORDER

Petitioner, Willie L. Dillard, under 28 U.S.C. § 2253, having moved for a certificate of probable cause to appeal the denial of a writ of habeas corpus;

It is, on this 27th day of February, 1981 hereby ORDERED that the motion be denied for the reasons stated in the Court's opinion filed on September 17, 1980.

Mitchell H. Cohen

MITCHELL H. COHEN, SENIOR JUDGE
UNITED STATES DISTRICT COURT

ORIGINAL FILED
FEB 27 1981
ANGELO W. LOCASCIO, CLERK

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA ex rel. WILLIE L. DILLARD, Petitioner,	:	Civil Action No. 80-1282
v.	:	On Petition for Writ of Habeas Corpus
R. J. MARKS, SUPERINTENDENT PENNSYLVANIA STATE PENITENITARY and THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, Respondents.	:	O P I N I O N

APPEARANCES:

WILLIE L. DILLARD, Pro Se
Huntingdon, Pennsylvania

JOHN J. DEGNAN
Attorney General of New Jersey
By: PATRICK C. BYRNE, Esquire
Deputy Attorney General
Princeton, New Jersey
Attorneys for Respondents

COHEN, Senior Judge:

The petitioner, Willie L. Dillard comes before the Court pursuant to 28 U.S.C. & 2254 seeking his release from the effects of his 1976 conviction in the Law Division of the New Jersey Superior Court on seven counts relating to a kidnapping and assault with intent to rape. Dillard also moves for the appointment of counsel to assist in the presentation of his petition for a writ of habeas corpus.

ORIGINAL FILED
SEP 17 1980
ANGELO W. LOCASCIO, CLERK

I.

Motion for Appointment of Counsel

Since habeas corpus is a civil and not a criminal matter, there is no constitutional right to the appointment of counsel in such actions. See United States ex rel. Sholter v. Claudy, 203 F.2d 805, 807 (3rd Cir. 1953); Hopkins v. Anderson, 507 F.2d 530, 533 (10th Cir. 1974), cert. denied 420 U. S. 920 (1975). However, we may appoint counsel for habeas petitioners in our discretion pursuant to 18 U.S.C. § 3006A(g).

We note that "[t]he need for counsel in the district court exists primarily when the judge's investigation shows that an evidentiary hearing is required or desirable." United States ex rel. Cole v. Mancusi, 429 F.2d 61, 66 (2d Cir. 1970), cert. denied 401 U. S. 957 (1970). In the case at bar there is no need for counsel to refine and sharpen petitioner's allegation. See Neely v. Duckworth, 473 F.Supp. 288, 294 (N.D. Ind. 1979). The facts of the incident leading to Dillard's conviction have not been questioned, and nothing could be gained from an evidentiary hearing. Since the facts in the case are beyond dispute and the relevant law on the issue in the petition has been adequately presented to us, it does not appear that counsel could be of any assistance to petitioner. We therefore deny the motion for appointment of counsel.

II.

The Relevant Facts

The record of Dillard's state court trial shows that at 1:00 A.M. on January 19, 1973, a car driven by him pulled up near where Patricia Ann Dixon and a friend were walking (Tr. 34). Dixon testified that the petitioner mumbled something, and that when she drew nearer to the car to hear what had been said, Dillard flung open the passenger-side door, displayed a knife and ordered her into the

automobile and attempted to rape her. (Tr. 37-38). The victim ultimately escaped from the automobile and was able to see part of its license number. (Tr. 62). Dixon had spent approximately twenty minutes with the petitioner on the city streets and in an illuminated alley.

At the Detective Bureau that same night, Dixon was asked to give a description of the person who had attacked her. She was able to give his height, weight, age, type and color of clothing he wore, build, and even described the pupils of his eyes. (Tr. 44-45). She was shown about one hundred photographs by the police on the night of her attack but did not identify any of the depicted men as her assailant. (Tr. 38). Dixon also went to the Detective Bureau on January 24, 1973 where Detective James Anderson showed her "about 11" (Tr. 39) photographs of persons matching her description of the assailant. She singled out one of the eleven, and told Anderson that she was "almost definitely sure" that the chosen photograph was of her attacker. (Tr. 39). Detective Anderson, seeking a more positive identification, again laid all eleven photographs before her, and then said:

> I'm not supposed to do this, but the picture that you picked out, if I told you that the man had the license tag No. WGK205, he's been previously arrested for the same things, and that he lives in North Camden, would you say that he's the man? (Tr. 40).

At that point, Dixon stated that she could say so "definitely." (Tr, 40).

The next time that Dixon saw the petitioner was a few weeks later at his preliminary hearing in Camden Municipal Court. When Dillard's name was called and he was brought before the court in handcuffs, the victim stated that she recognized him as her assailant immediately. She testified that she recognized him "[b]ecause that night we were very close and I remember his face that night, and I remember his face now." (Tr. 43).

The petitioner was pretried in the Camden County Courthouse on October 26, 1976. (Tr. 3). On the second day of testimony, Dillard's counsel moved to exclude his photographic identification. (Tr. 71). The court ruled that it was tainted by the Detective's suggestive remarks to the victim and therefore could not be used as evidence. (Tr. 85). The judge also stated tht Dixon's positive courtroom identification of Dillard was not in any way a product of the improper photographic display nor of having seen the petitioner at the preliminary hearing. (Tr. 87). A jury was subsequently empaneled and sworn (Tr. 89), and the petitioner was convicted by the jury and sentenced to 30 to 35 years for the kidnapping, an indeterminate term not to exceed 12 years for the assault with intent to rape and a consecutive indeterminate term not to exceed three years for lewdness.

On appeal before the Appellate Division of New Jersey Superior Court, the petitioner's counsel argued that Dixon's in-court identification was the direct result of the impermissibly suggestive photographic identification and the allegedly improper manner in which the petitioner was brought before Dixon at the outset of the preliminary hearing. This contention was denied in an unpublished per curiam opinion on July 8, 1979. A petition for certification before the New Jersey Supreme Court was denied on March 11, 1980.

Having thus exhausted all of his state remedies as is required by 28 U.S.C. § 2254(b), Dillard petitioned this Court for a writ of habeas corpus on May 5, 1980. Dillard bases his petition on the contention that Dixon's in-court identification of him "was not an independent recollection, but a result of the suggestive identification procedure" so that testimony relating to the in-court identification should not have been admitted at trial. (Habeas petition at 4).

III.

Jurisdiction

The New Jersey Attorney General contends that we are without jurisdiction to grant the relief which Dillard seeks. The Attorney General's brief notes that Dillard is presently incarcerated in Pennsylvania under several prison sentences based on the laws of that State. The State of New Jersey contends that habeas corpus jurisdiction would only lie in a Pennsylvania district court, since it is in Pennsylvania that the superintendent of the prison in which the petitioner is incarcerated resides. Several cases are cited to support this proposition. See Billiteri v. United States Board of Parole, 541 F.2d 938 (2d Cir. 1976); White v. Tennessee, 447 F.2d 1354 (6th Cir. 1971), cert. denied 406 U. S. 921 (1971), United States ex rel. Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969), cert. denied 396 U. S. 918 (1969).

The writ of habeas corpus is entertained by district courts for the purpose of determining the legality of a petitioner's custody. 28 U.S.C. § 2254(a); see U. S. ex rel. Rybarik v. Maroney, 406 F.2d 1055 (3d Cir. 1969). The concept of custody is not as narrow as the Attorney General suggests. It is no always a condition that the "custodians" be guardians who hold the detainee in close physical confinement. Jones v. Cunningham, 371 U. S. 236, 240 (1963). In Jones, it was held that the habeas petitioner's parole imposed sufficient constraints on his freedom to constitute the necessary "custody" for jurisdiction to issue the writ. See U.S.C. § 2241(c)(3). Since the parole board was still within the district court's jurisdiction, it was not important that the petitioner was not being held in the jurisdiction. See Billiteri v. U. S. Board of Parole, 541 F.2d at 948; see also Peyton v. Rowe, 391 U. S. 54, 55, 61 (1968) (a prisoner may attack a sentence which he will begin in the future; this is "custody" for purposes of 28 U.S.C. § 2241(c)(3)).

In the instant case, the State of New Jersey has issued a detainer for Dillard with authorities in Pennsylvania. This detainer imposes real restrictions on the petitioner's freedom which would be immediately felt if he were suddenly granted freedom from the Pennsylvania charges by authorities of that State. In a real sense, the authorities in New Jersey who issued the detainer are as much Dillard's custodians as the authorities of the Pennsylvania prison system. Those New Jersey authorities are unquestionably within our jurisdiction and can be reached by service of process. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U. S. 484, 495 (1973).

The Attorney General has cited cases for the proposition that a detainer from one state over a petitioner incarcerated in another state does not create jurisdiction in the district court of the state which issued it. See Ashley v. State of Washington, 394 F.2d 125 (9th Cir. 1968); United States ex rel. Fletcher v. Maroney, 280 F.Supp. 277 (W.D. Pa. 1968); cert. denied 393 U. S. 873 (1968); Summers v. McNamara, 239 F.Supp. 806 (D. Or. 1965). But this is not necessarily true. In Braden v. 30th Judicial Circuit Court of Kentucky, 410 U. S. 484 (1973), the United States Supreme Court recognized the right of a petitioner held in one state to attack a detainer lodged against him by another state. The court stated at 498-99 that:

> In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. Under these circumstances it would serve no useful purpose to apply the Ahrens rule and require that the action be brought in Alabama. [1]

[1] The "Ahrens rule" was articulated in Ahrens v. Clark, 335 U. S. 188 (1948) and stated that the prisoner must be in the territorial confine of the District in which he seeks habeas. The court expressed the view in Braden at 500 that it no longer considered the decision in Ahrens as establishing an inflexible jurisdictional rule.

The Commonwealth of Pennsylvania has no interest in the State of New Jersey detainer against Dillard. The petitioner's dispute is with the New Jersey conviction. Under the circumstances of this case, as in Braden, it would serve no purpose to inflexibly apply the rule of Ahrens v. Clark.

We find that this Court has jurisdiction to grant habeas corpus relief to the petitioner. See Braden at 498, 499 and n.15; cf. United States v. Fletcher, 425 F.Supp. 918, 921 (D.C. D.C. 1976) (petitioner jailed under District of Columbia sentence in federal prison in California may seek habeas against her custodian in the District of Columbia).

IV.

The Petition

Having determined that we have jurisdiction to consider this petition, we now address its merits. We agree with the state courts that the photographic display was impermissibly suggestive because of Detective Anderson's remarks to the victim. The only question presented by this petition is whether the display and remarks so tainted Dixon's subsequent in-court identification of Dillard that it should not have been admitted into evidence. The Appellate Division of the New Jersey Superior Court held that no such taint existed, and the New Jersey Supreme Court denied Dillard's petition for certification. We find that it was proper to allow the in-court identification as evidence at the petitioner's trial, and therefore we deny Dillard's petition for a writ of habeas corpus.

In habeas corpus actions under 28 U.S.C. § 2254, there is a presumption that a state court's determination on the merits of a factual issue is correct. (Furthermore, the petitioner here does not question the facts and circumstances surrounding the attack on Dixon. Therefore, the facts as found by the trial court are those which will be applied to the relevant case law). Section 2254(d)(6)

states that this presumption will be overcome where the applicant proves that he "did not receive a full, fair and adequate hearing in the court proceeding." Dillard argues that allowing Dixon's allegedly tainted in-court identification of him as her attacker denied him the guarantees of Section 2254(d)(6).

The instant case is controlled by the United States Supreme Court's holding in Neil v. Biggers, 409 U. S. 188 (1972). That case involved a rape, and the petitioner there was first identified by the victim in a "show-up" about seven months after the crime. The victim had viewed other suspects both in line-up and photographic display several times prior to this, and like Dixon in the instant case, had never identified someone other than the petitioner as her assailant. Biggers at 195. The petitioner sought a writ of habeas corpus on the grounds that his identification procedure and the circumstances surrounding it was so suggestive as to have constituted a denial of due process. Id. at 196. The court stated the relevant test which is fully applicable to Dillard's petition, quoting from Simmons v. United States, 390 U. S. 377, 384

> "We hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification."

The court in Biggers recognized that the "show-up" identification was impermissibly suggestive, yet under a "totality of the circumstances" test found that there was "no substantial likelihood of misidentification." Id. at 201. The contested in-court identification of the petitioner was therefore permitted.

The court in Neil v. Biggers articulated the factors to be considered in evaluating the likelihood of misidentification:

> [O]pportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at

the confrontation, and the length of time between the crime and the confrontation. Id. at 199-200.

The application of these factors is instructive to this Court in the matter of Dillard's petition. The one-half hour which the victim in Biggers spent with her attacker was found to be a "considerable period of time." The artificial lighting in her home where the attack was initiated and the moonlight outdoors where it was culminated were noted as "adequate." Importance was attached to the fact that she faced her attacker "directly and intimately" during the attack. "She was a casual observer, but rather the victim of one of the most personally humiliating of all crimes." Id. at 200. Her ability to describe her attacker's approximate age, height, weight, skin texture, build and voice was found to be more than sufficient. Her level of certainly that the petitioner was her attacker was very high. Id. Under these circumstances the Supreme Court held that the in-court identification evidence had been properly allowed to be considered by the jury. Id at 201.

Dixon, the victim of an armed kidnapping and assault with intent to rape, spent nearly twenty minutes with Dillard in his automobile at least within a few feet of him at all times and occasionally with her face "right up to" his. (Tr. 38,46). There was adequate lighting from overhead street lights where they were parked when the assault took place. Her description of her assailant on the night of the attack was thorough and accurate and portrayed Dillard. (Tr. 44-46). At no time did Dixon identify anyone other than the petitioner as her assailant and she demonstrated high levels of certainty both at the photo identification and the in-court identification. (Tr. 39, 43, 51). Analyzing this case under the standards of Neil v. Biggers, the risk of misidentification is substantially nonexistent.

This is not to suggest that an impermissibly suggestive identification procedure never could be so prejudicial as to require exclusion of subsequent identification from evidence. In Foster v.

California, 394 U. S. 440 (1969), the only witness to a crime was asked to pick the perpetrator from a three-man line-up where the petitioner was at least six inches taller than the other man in the line-up and was the only one attired in a leather jacket. Only after a subsequent person-to-person confrontation between the witness and the victim, and a second line-up, could the witness positively identify the petitioner. This procedure was held to be impermissible and the subsequent in-court identification so tainted by the procedure that there was a likelihood of irreparably mistaken identity. As a result, none of the identification testimony was allowed. Id. at 441-43. In the case at bar, the challenge identification, viewed in the totality of the circumstances, did not so infect the integrity of the truth finding process as to require exclusion of the in-court identification. See Stovall v. Denno, 388 U. S. 293, 298 (1967).

The victim's own testimony suggests as well that her in-court identification of Dillard was the result of an independent recollection. (Tr. 43). To suppress the in-court identification even though it clearly was made independent of any effects from the suggestive photographic display would serve no useful purpose. The totality of the circumstances approach seeks to ensure the reliability of evidence, thus, allowing the trier of fact to weigh all of the trustworthy evidence. Manson v. Braithwaite, 432 U. S. 98, 110 (1977). A per se rule of exclusion, based on possible taint from prior suggestive procedures, "goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." See United States v. Cook, 608 F.2d 1175, 1178 (9th Cir. 1979), cert. denied 100 S.Ct. 706 (1979).

For the foregoing reasons, Willie L. Dillard's petition to this Court for a writ of habeas corpus is hereby denied.

Mitchell H. Cohen

MITCHELL H. COHEN, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Pcd

SUPREME COURT OF NEW JERSEY
C-509 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WILLIE LEE DILLARD,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2360-79 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of March, 1980.

Stephen Townsend
Clerk

FILED
SUPREME COURT
MAR 13 1980

Stephen Townsend
Clerk

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NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2360-76

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIE LEE DILLARD,

Defendant-Appellant.

Submitted July 2, 1979--Decided [illegible] 9 1979

Before Judges Lora and Botter.

On appeal from Camden County Court.

Stanley C. Van Ness, Public Defender, attorney for appellant (John H. Watson, Jr., Designated Attorney, of counsel and on the brief).

John J. Degnan, Attorney General, attorney for respondent (Patrick C. Byrne, Deputy Attorney General, of counsel and on the brief).

PER CURIAM.

Tried to a jury, defendant was convicted of assault with intent to rape while armed, kidnapping while armed, carrying a knife with intent to use it unlawfully against another and carrying a dangerous instrument, a knife, threat to kill, atrocious assault and battery, and lewdness. Pursuant to the Sex Offender Act, an indeterminate term not to exceed 12 years was imposed for the assault with intent to rape and a consecutive indeterminate term not to exceed three years for lewdness. For the kidnapping conviction a 30 to 35 years State Prison term was imposed consecutive

to the sentences imposed under the Sex Offender Act. For the remaining crimes, lesser State Prison terms were imposed concurrent with that imposed for kidnapping.

Defendant's first contention is that the trial judge erred in permitting the in-court identification of defendant. We find no merit to this contention. R.2:11-3(e)(2).

Defendant also contends that the trial judge erred in imposing State Prison terms consecutive to the indeterminate terms imposed for the Sex Offender Act offenses. Defendant contends that, except for the armed feature offense, N.J.S.A. 2A:151-5, all the offenses in this single episode were related to the sex offenses, and defendant should have been sentenced solely as a sex offender. Thus, he contends that only concurrent terms should have been imposed.

The State agrees that the sentences on the non-sex offenses should have been made concurrent with the sentences imposed for the sex offenses. State v. Clark, 65 N.J. 426 (1974); State v. McCauley, 157 N.J.Super. 349 (App.Div. 1978), certif. den. 77 N.J. 500 (1978). We agree. Moreover, although not raised by defendant, since all of the convictions arose out of one criminal episode, some should be merged and vacated.

Accordingly, sua sponte, we will merge the two convictions for carrying a knife under counts five and six and the conviction on count seven of threat to kill into the convictions on counts one and two for assault with intent to rape while armed. See State v. Young, 77 N.J. 245, 248, n. 1 (1978), holding that a conviction for assault with an offensive weapon merges into that for assault with intent to kill; State v. Best, 70 N.J. 56 (1976), holding that possession of a dangerous knife and assault with a dangerous weapon merge into

an armed robbery conviction. Therefore, we vacate the convictions and sentences imposed on counts five, six and seven. We also direct that the sentences on the non-sex offenses, kidnapping while armed (counts three and four) and atrocious assault and battery (count nine) be made concurrent with those imposed under the Sex Offender Act. State v. Clark, supra; State v. McCauley, supra.

Affirmed in part and modified in part, and remanded to the trial court solely for the purpose of entering an amended judgment of conviction and sentence consistent with this opinion.

